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## Criminal Justice after 9-11: ICC or Military Tribunals

By Thomas Mertens\*

### A. Introduction

Nowadays, widespread consensus exists that the dramatic events of September 11, 2001 changed not only the country that suffered these attacks but also the way many in the West view the world outside this exclusive circle. For quite a number, it confirmed Huntington's thesis of a clash of civilizations – a vision of a future of 'us' versus 'them'.<sup>1</sup> But as the attackers were being identified, it became clear that in a sense they came from among us; although technically foreign nationals all, they lived and studied inconspicuously in western, multicultural societies.<sup>2</sup> How are we then to deal with this enemy within? How is democracy to fight this so-called War on Terror<sup>3</sup> and survive? Such questions are obviously not new. Bearing De Tocqueville's assertion in mind that a long war is not needed in order to put freedom at risk in a democratic society,<sup>4</sup> this article, using the technique of a thought experiment, seeks to examine the increased prerogatives that governments – fearing the enemy within – have granted themselves in the realm of criminal law to deal with

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<sup>1</sup> S. Huntington, *The Clash of Civilizations*, 72 *Foreign Affairs* 22-49 (1993); B. TIBI, *FUNDAMENTALISMUS IM ISLAM* (Darmstadt 2000).

<sup>2</sup> Those who carried out and provided the logistical support for the 9/11 attacks had studied in Germany, the United States, lived in the UK etc.; similarly, those accused of the Madrid bombings have been present in the country for a number of years and were registered at universities there.

<sup>3</sup> According to President Bush, the 'war on terrorism' is a 'war' on many fronts: foreign governments will have to choose between supporting the war on terrorism or not; terrorists' financial networks will be dismantled; the military will be on the highest alert for a just battle; internal, domestic safety will be increased by a set of legal measures; and the perpetrators of these random killings and of the attack on civilization will be brought 'to justice'. Taken from Bush's State of the Union Address 9 days after the attacks: J.W. EDWARDS & L. DE ROSE, *UNITED WE STAND - A MESSAGE FOR ALL AMERICANS* (Ann Arbor, MI 2001).

<sup>4</sup> A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 621 (Harvey C. Mansfield & Delba Winthrop ed., Chicago UP, 2000).

the perceived threat. This experiment will bring the reader, in a non-specialist way, from the criminal justice system of Germany to the possible role of an operational International Criminal Court, and from the criminal justice system of the United States to military tribunals as a means of dealing with what those in power claim is an extraordinary threat.

#### B. An Imaginary Case: Criminal Justice in Germany as 'Rechtsstaat'

One of the frontlines of the so-called war on terrorism is the legal one: those responsible "must be brought to justice".<sup>5</sup> What follows is an attempt to envisage the path this legal battle might take.<sup>6</sup> The main actor in this legal fantasy is Osama Bin Laden. Suppose he were to surface in Europe one of these days, say in Germany. He had managed to escape Tora Bora and the Afghan-Pakistan border long ago and, after much wandering along drug and migrant trafficking routes had ended up in Europe. He has assumed a new identity, built a new life inside the Fortress Europe, but as restrictions on the level of pressure that may be exerted on captured Al-Qaeda suspects are lifted, the intelligence agencies of the West – now co-operating like never before – gain information as to his whereabouts.<sup>7</sup> He is in Germany. Since the Security Council has declared that the attacks of September 11 constituted a threat to international peace and security,<sup>8</sup> and although the German Government has not been allowed an insight into the evidence against Bin Laden, it is willing to accept that he is the mastermind behind the attacks. Germany's border control officers arrest Bin Laden as he attempts to flee the net encircling him. By doing so, Germany also fulfills its duty as a loyal member of NATO, as Article 5 of the NATO-treaty has been invoked. How could this highly implausible story continue?

According to the rule of law, the German Government could not immediately put Bin Laden on a plane to the United States - washing their hands of a most embarrassing detainee - but must hold him in custody in a safeguarded penitentiary awaiting a request for his extradition. Although there are a number of extradition treaties between the US and Germany, a request by the US Government for Bin Laden's extradition would not in fact be so simple a thing. Germany is a state party

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<sup>5</sup> EDWARDS, *supra* note 3.

<sup>6</sup> When this paper was first conceived the courts had yet to provide guidance as to the course they intended to follow; the recent days of course have seen the German courts make their mark in the war on terror gratifyingly similar to the lines envisaged here. See *Infra* note 15.

<sup>7</sup> J. Lelyveld, In Guantanamo, *The New York Review of Books*, Nov. 7, 2002 (quoting an officer: "If we put them in the Waldorf Astoria, I don't think we could get them to talk").

<sup>8</sup> G.A. Res. 1368, U.N. (2001).

to the European Convention on Human Rights (ECHR) and to its Protocol VI, which forbids the administration of the death penalty.<sup>9</sup> These commitments on the part of State Parties to the ECHR played an important role in a case that took place some time ago.<sup>10</sup> An American NATO-serviceman stationed in The Netherlands had killed his wife in The Netherlands and had been arrested. The US requested his extradition based on the NATO-Status Treaty. That Treaty gives primary jurisdiction to the sending State for this crime.<sup>11</sup> To prevent his extradition to the US, he successfully appealed to The Netherlands' obligations under Protocol VI, Art. 1 to the ECHR: "The death penalty shall be abolished. No-one shall be condemned to such penalty or executed." That State Parties of the ECHR cannot extradite those in their detention to trial in countries where they are likely to face torture or inhuman and degrading treatment has been a mainstay of the Council of Europe legal order since the now-famous *Soering* judgment.<sup>12</sup>

Bin Laden's lawyers naturally call upon this important precedent. Additionally, it is argued that it is highly unlikely that their client will face a fair trial after all that has been said about him in the media. Article 6 of the ECHR requires that: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law" – a stipulation, it is alleged, that the US Government could not fulfill; even outside the US it is now received opinion, endlessly repeated, that Bin Laden and Al-Qaeda planned and carried out the 9/11 attacks. Finally, his lawyers argue that since September 11<sup>th</sup> the standard of civil liberties in the US has deteriorated significantly: hundreds of people are now detained without trial (contrary to the right of *habeas corpus*)<sup>13</sup> and the confidentiality principle between lawyer and client – so integral to the integrity of the justice system – is no longer respected, as

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<sup>9</sup> In *Unsere Erneuerung. Nach dem Krieg: Die Wiedergeburt Europas*, Habermas cites the abolition of the death penalty as one of the defining elements of European identity. Habermas, *Unsere Erneuerung. Nach dem Krieg: Die Wiedergeburt Europas*, FRANKFURTER ALLGEMEINE ZEITUNG, May 31, 2003.

<sup>10</sup> NJ, 1991, 249 (Short) (Dutch Case Law).

<sup>11</sup> North Atlantic Treaty, Apr. 4, 1949, art. 7, 3.

<sup>12</sup> *Soering v. UK* (1989); available at <http://hudoc.echr.coe.int/hudoc/>. The *Soering* case is particularly pertinent as the applicant – a German national accused of the murder of his girlfriend's parents – faced the death penalty if convicted in the US; the Court did not conclude that the death penalty *per se* was contrary to the provisions of Article 3 but rather held that the manner in which it was imposed or executed or the conditions of detention whilst awaiting execution were two factors that may, dependent upon the circumstances of the case, constitute a breach of Article 3. The severity of the conditions in which detainees in Guantanamo Bay are kept leaves little doubt that the threshold of inhuman and degrading treatment would be met, even without the allegation that torture is a regular tool of interrogation there.

<sup>13</sup> Y.B Eur. Conv. on H.R. Article 5; Article 9 ICCPR, and U.S. Const. amend. V.

such conversations and correspondence are now intercepted.<sup>14</sup> In fact, there are a number of interesting terror related extradition cases currently underway, highlighting the difficulties regarding extradition of suspects from Germany to the US.<sup>15</sup>

According to the thought experiment, the German courts show themselves fairly immune to political pressure, whether from the German Government or from the European Union eager to rebuild bridges with the US. And in the light of the above, it is fair to suppose that the request by the US for the extradition of Bin Laden would be refused. The German Government cannot but obey the ruling of the court and ends up with Bin Laden in its custody. So, what next for the world's most infamous terrorist?

### C. Scenario One: ICC

Let us imagine that the German Government turns to the International Criminal Court (ICC), in an attempt to see Bin Laden charged with crimes against humanity. The German authorities argue that the 9/11 attacks fit exactly the definition of Article 7 of the Rome Statute: "Crime against humanity means murder when committed as part of a widespread or systematic attack directed against any civilian population"<sup>16</sup> and as anticipated by Article 14 (1) of the Statute.<sup>17</sup> This description of the crime would fit the rhetoric of President Bush himself, that the attacks on his nation constituted an attack on civilization itself. Moreover, in his taped addresses to the world, Bin Laden has repeatedly called for an attack on all Americans without prejudice.<sup>18</sup> For such crimes was the ICC established.

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<sup>14</sup> Provisions of the Patriot Act and the changes it brought are considered in more detail below.

<sup>15</sup> M. Hartwig, *The German Federal Constitutional Court and the Extradition of Alleged Terrorists to the United States*, 5 German Law Journal, 3 (2004), at <http://www.germanlawjournal.com>. On the recent overturning of alleged terrorist convictions by the German Federal Criminal Court, see <http://www.rferl.org/featuresarticle/2004/3/76BF1BD9-921B-4DDB-A5BC-28CC94328693.html>; <http://news.bbc.co.uk/1/hi/world/europe/3592857.stm>.

<sup>16</sup> In this respect, one can allege that the 9/11 crime falls into the same category as the assassination of 8,000 Kurdish civilians in Halebja in 1988 or that of 7,000 Muslims in Srebrenica in 1995, to mention only a couple of examples. It almost goes without saying that so far states have been far more efficient in the killing of innocents than any terrorist organisation. That Bin Laden should be tried on the charge of crimes against humanity is also suggested by G. ROBERTSON, *CRIMES AGAINST HUMANITY - THE STRUGGLE FOR GLOBAL JUSTICE* 507-510 (2d ed. Harmondsworth 2002).

<sup>17</sup> "A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation...."

<sup>18</sup> See Y. BODANSKY, *BIN LADEN - THE MAN WHO DECLARED WAR ON AMERICA* 279-280 (New York 2001) (1999). See also '... to kill the Americans and their allies - civilian and military - is an individual duty for

If the German Government chose to turn Bin Laden over to the ICC, it would opt for a court that was established by the Rome Statute, signed by 120 states (now 139) in 1998 and thus reasonably representative of the international community as a whole. The treaty establishing the ICC came into force, however, only in July 2002, following ratification by 60 states (now 92). To be sure, the ICC has no retroactive force and can only try new cases. In this thought experiment, the German Government holds that the principle of *nulla poena sine lege* is nonetheless respected as although the attacks predate the establishment of the court, the statute itself had already been signed.<sup>19</sup>

In addition, the German Government maintains that the crimes with which Bin Laden is charged were already, prior to the Rome Statute, illegal under international law. The definition of crimes against humanity, over which the ICC now has jurisdiction, was found in existing positive law, such as treaties (the Genocide and Geneva Conventions), precedents (decisions and rules of the Nuremberg- and Tokyo-tribunals, and those of the more recent Yugoslavia- and Rwanda-tribunals), customary law and prevailing legal opinion (what some would call 'natural law'). Often, as in the *Eichmann* trial,<sup>20</sup> the issue of an international court has been raised in relation to crimes against humanity. With the high profile trial of Bin Laden, the ICC would have the opportunity to establish its reputation. Germany turns over Bin Laden to the ICC in the Dutch city of the Hague, which prepares to host the first major international trial of the 21st century.<sup>21</sup>

The difficulties connected with an extradition to the US, such as the likely imposition of the death penalty and the near-certainty of a lack of fair trial and due process are thus resolved. But a new major problem arises. It is unclear whether the ICC has jurisdiction, since it does not have universal jurisdiction automatically. There

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every Muslim ...'. The International Islamic Front for Jihad against Jews and Crusaders, February 23, 1998 at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>.

<sup>19</sup> A claim that places the German Government admittedly in direct contravention of Art. 11(1) of the Rome Statute.

<sup>20</sup> H. ARENDT, *EICHMANN IN JERUSALEM* 269 (Harmondsworth 1994) (1963) (concurring with previous similar comments by K. Jaspers).

<sup>21</sup> A salient but often forgotten detail in this context is the fact that ideas of an international criminal court as it functioned for the first time in Nuremberg do not originate from (the context of) the Second World War and the Charter of London, but rather from the First World War. After Germany's defeat, an international tribunal was pursued, in particular to try the German emperor (under the slogan 'Hang the Kaiser', Treaty of Versailles, sec. 227-9). At that time, the Dutch Government objected. By not extraditing the German emperor, who fled to The Netherlands, and calling upon its neutrality, The Netherlands obstructed this first step towards international criminal justice. See, e.g., T. BOWDER, *BLIND EYE TO MURDER* 17-19 (London 1995) (1981); Robertson, *supra* note 16, at 225-6.

are a number of grounds upon which the ICC can try a case (Art. 13), for example, where the Security Council demands prosecution in its powers under Chapter VII, where a State Party refers a case and where the prosecutor initiates his or her own investigation. However, admissibility is governed by the principle that the national state of the accused or the state where the crime took place has the right to investigate and try the suspect first; the ICC thus has jurisdiction only if the state of which the suspect is a national fails to prosecute<sup>22</sup> – being either unable or unwilling –, or if the state within whose territory the crime is committed waives its jurisdictional rights (Art. 17(1)(a)). It is unimaginable, even in this flight of fancy, that the countries involved will defer their own jurisdiction in favor of the ICC. The decision of Saudi Arabia in 1994 to strip Bin Laden of his nationality has apparently left him stateless<sup>23</sup> and it is unlikely that any state will claim Bin Laden as one of its nationals in order to give the ICC jurisdiction. Nor is it conceivable that the state in which the crimes were committed would waive its jurisdiction. The US, as is well known, opposes the ICC vigorously.<sup>24</sup> Moreover, the US veto on the Security Council ensures that this body will not make the appropriate request granting the ICC jurisdiction.

Yet, the Court can determine that a state is unwilling or unable to try a suspect and waive the principle of complementarity, where it judges that national proceedings “were not or are not being conducted independently or impartially” (Art. 17(2)(c)). It is highly unlikely, however, although not inconceivable that the Court would, on the same grounds that gave the German courts such cause for alarm, hold that the US could not offer Bin Laden an independent or impartial trial and assert their own jurisdiction. Such boot-strapping is not unusual for international tribunals; the International Tribunal for the Former Yugoslavia (ICTY) had to face similar hurdles

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<sup>22</sup> Robertson, *supra* note 16, at 350. This is the principle of complementarity.

<sup>23</sup> The story of the Saudi authorities stripping Bin Laden of his citizenship was carried by the BBC. *Kuwait Disowns Bin Laden Aide*, CNN, Oct. 14, 2001, at [http://news.bbc.co.uk/1/hi/english/world/middle\\_east/newsid\\_1599000/1599088.stm](http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_1599000/1599088.stm). However, an international arrest warrant for Bin Laden posted on the interpol website in 1998 lists his nationality as Saudi Arabian. <http://www.interpol.int/public/Wanted/Notices/> (accessed 15th April 2004).

<sup>24</sup> Even though many argued that it is exactly the principle of complementarity that “offers a greater protection to American personnel than current international practice and/or status of forces agreements that uphold a sovereign nation’s exclusive jurisdiction to try and punish offences committed by persons of any nationality within its borders”, United Nations Association of the United States of America, <http://www.unausa.org/dc/advocacy/iccfact.htm>. In connection with this, this principle would also render obsolete the notorious and at first secret appendix B (granting immunity to NATO personnel from any form of arrest) to the unsuccessful Rambouillet negotiations preceding the Kosovo war.

in *Tadic*,<sup>25</sup> and successfully answered the questions about its jurisdiction.

Moreover, the German Government argues that the US Government should be consistent: having supported the ICTY, it must support the ICC as well. *Prima facie*, this might seem a weak argument, but the attacks of September 11<sup>th</sup> and the continuation of horrific attacks on civilian populations around the world underline the necessity of ongoing international cooperation, not only as far as information and intelligence sharing are concerned, but also in the field of criminal law. If the Bush administration explicitly states that it considers these attacks to constitute a crime against humanity, it should, so it is argued, allow those accused of masterminding the attacks to be tried by humanity. Moreover, it is worth noting that Al-Qaeda is accused of more crimes than those committed in New York and Washington. As the whole of the international community is increasingly affected, the US cannot claim precedence over the rights of other countries to try the network's mastermind and the truly international scope of Al-Qaeda's reach means that the ICC is again the only place where justice for all their victims can be done.

Germany is determined to see that such justice be done and hands Bin Laden over to the ICC in The Hague, relying upon the Dutch Government's commitment to international law despite the difficulties this may cause them. In 2000 the US passed the so-called 'The American Servicemembers' Protection Act', designed to protect "US military personnel and other elected and appointed officials (...) against criminal prosecution by an International Criminal Court to which the US is not a party".<sup>26</sup> The Act authorizes the president "to use all means necessary and appropriate to bring about the release of US personnel or other parties held by the ICC" (Section 8 a). Accordingly, were the Court to claim jurisdiction on the grounds suggested above, it is not beyond the bounds of imagination to foresee a US raid on The Netherlands to free our suspect from the captivity of the ICC were the wishes of the US Government to be disregarded.<sup>27</sup>

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<sup>25</sup> Tadic Case (Prosecutor v. Dusko Tadic), International Criminal Tribunal for the former Yugoslavia, The Hague, (1995) (published on the internet at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.)

<sup>26</sup> <http://www.unausa.org/dc/advocacy/iccfact.htm>.

<sup>27</sup> Additionally, the Act forbids any cooperation with the ICC, on the level of intelligence cooperation, like handing over classified national security material (Section 6) on the level of physical extradition of suspects to the ICC (Section 4 c), and on the level of military support to countries that do recognize the ICC (Section 7 a). The US tries to circumvent the ICC's jurisdiction by means of bilateral agreements, on the basis of article 98 of the ICC Statute: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".



#### D. Criminal Justice in the US Post- 9/11: General Situation

For Bin Laden to find himself in the custody of the Americans, any number of events may have occurred. Imagine that German state officials do not respect the rule of law. Either the authorities hand Bin Laden directly over to the Americans, perhaps to the US troops stationed in Germany, or, more shockingly, decide that political and not legal arguments must prevail and put him on a plane to the States in contravention of the ruling of it's own courts.<sup>28</sup> Whichever route he has taken, Bin Laden is in US custody, facing trial in a criminal justice system that has changed radically over the course of the last few years.<sup>29</sup> The principal changes can be summarized in three categories: measures in relation to domestic security, measures concerning the treatment of suspects of terrorism – this category consisting mainly of detainees taken into captivity during the Afghan war – and finally the institutionalization of military commissions or tribunals, most likely to be charged with trying Bin Laden.

##### I. The domestic legal system

In Bush's legal war against terrorism, the most important change on the domestic front is the 'USA Patriot Act' (2001), an acronym for 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism'.<sup>30</sup> This act aims to enhance domestic security and does so by introducing more than 1000 provisions concerning surveillance procedures on all kinds of international money transactions, border control, criminal laws against terrorism, and information coordination.

At the core of this Act stands a broad definition of 'terrorism' targeted specifically at non-US citizens. It gives greatly enhanced powers to both domestic law enforcement and domestic and international intelligence agencies, and eliminates the checks and balances that previously gave the judiciary the opportunity to review the operation of such powers. If the attorney general has reasonable grounds for suspecting an alien of terrorism or aiding terrorism broadly defined, he may detain

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<sup>28</sup> Possibly using the slogan: "Fac et excusa" (act first and justify later), as, for instance, cited by I. Kant, *Perpetual Peace - A Philosophical Sketch*, in KANT'S POLITICAL WRITINGS 120 (H. Reiss ed., Cambridge UP 1970). Moreover, for the German government's 'disappointed' reaction to the FCC's ruling on Mounir El Motassadeq's case, see <http://www.bundesregierung.de/-/413.616894/pressemitteilung/Schily-Entscheidung-ist-zu-bed.htm>.

<sup>29</sup> See also W.E. Scheuerman, *Rethinking Crisis Government*, in 9 CONSTITUTIONS 492-505 (2002).

<sup>30</sup> New anti-terrorist legislation has also been implemented in countries like the UK, France and Germany, and in the EU as a whole. On Britain's detention camp under this legislation, see <http://observer.guardian.co.uk/waronterrorism/story/0,1373,1106664,00.html>.

that person for seven days without any charge. If he then finds 'the release of the alien will threaten the national security of the United States or the safety of the community or any person,' this detainee may be held in custody for a much longer period, indeed, indefinitely. As a result, newspapers report regularly upon the detainment of several hundred of people by the US Justice Department without conviction or based on minor charges unrelated to terrorism.<sup>31</sup> Thus, as an alien under the Patriot Act, it is suggested that Bin Laden might be subject to indefinite detention without trial, held incommunicado, at the direction of the attorney-general.

The most important argument in favor of such legislation as the Patriot Act says that the protection of individual rights, like liberty and privacy, cannot come at the cost of the safety of society as a whole. The attacks of September 11<sup>th</sup> suggested the need to find a new balance between basic rights and security, the latter being the prime objective of the leviathan. The US Constitution, along with certain rights guaranteed to all individuals,<sup>32</sup> should not become a suicide pact. Securing the homeland, following such reasoning, justifies the enhancement of the executive's powers and the corresponding reduction of the procedural rights of alleged criminals.

In his important series of articles examining the state of this balance post-9/11, Ronald Dworkin acknowledges the importance of security, yet argues that it is misleading to speak of finding a new balance between risks and rights, between security and liberties. The question is not where our interests lie, he writes, but what justice requires. As a principle, government must treat everyone as of equal status and with equal concern, since every human life has a distinct and equal inherent value.<sup>33</sup> This requires that a system of criminal law shall treat all equally in equal cases. If the system denies to one class of suspects rights that it considers essential for others, it acts unfairly. A system that nevertheless aims at doing so (as does the USA Patriot Act by specifically targeting non-US citizens) has to meet the following

<sup>31</sup> See, e.g., S. Taylor Jr., *Congress Should Investigate Ashcroft's Detentions*, THE ATLANTIC MONTHLY (May 28, 2002); R. Dworkin, *The Threat to Patriotism*, NEW YORK REVIEW OF BOOKS (February 28, 2002). Today, such harsh detention regimes are also being applied to US citizens, like José Padilla, see, e.g., R. Dworkin, *Terror & the Attack on Civil Liberties*, NEW YORK REVIEW OF BOOKS (November 6, 2003).

<sup>32</sup> Supreme Court decision 2491, 2500 (2001), in 'Zadvydas v. Davis' evidences that "the Due Process Clause applies to all 'persons' within the United States, (Fifth Amendment: "no person shall be held to answer for a capital, or otherwise infamous crime, (...) without due process of law") See also R. Dworkin, *The Threat to Patriotism*, NEW YORK REVIEW OF BOOKS (February 28, 2002); ACLU letter to Secretary of Defence Rumsfeld, January 15, 2002, <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9301&c=111>.

<sup>33</sup> See, e.g., R. DWORKIN, *FREEDOM'S LAW - THE MORAL READING OF THE AMERICAN CONSTITUTION* 10, 25 (Oxford 1966); R. Dworkin, *Terror & the Attack on Civil Liberties*, NEW YORK REVIEW OF BOOKS (November 6, 2003).

two requirements, so Dworkin argues. First, it must have the candor to admit that it is treating one class of suspects unjustly because of security reasons. Second, it must reduce this injustice to the absolute minimum by allowing only the smallest curtailment of traditional rights possible.<sup>34</sup> The new legislation does not meet these two essential conditions. It rather testifies to the Bush administration's general attitude of putting American safety first, at the expense of what Dworkin calls the international moral order that nations should respect even under threat.<sup>35</sup> As a threat to US security, Bin Laden would undoubtedly find himself in special custody. Arguably, however, it would not suit the Bush administration to keep Bin Laden in indefinite detention. Bush stated that the perpetrators of September 11<sup>th</sup> had to be brought to justice. What kind of justice would that be?

## II. Foreign Nationals detained during the War on Terror.

To imagine the most likely scenario of Bin Laden in US custody, it would be helpful to look at the fate of those already held in US custody. The second element of the US's legal war against terrorism concerns the treatment of those foreign nationals captured in the course of the war on terror, mainly in Afghanistan and now in Iraq. Bin Laden would surely be the most important detainee of the War on Terror, but he is not the first. From the perspective of international law, matters seem quite clear: the treatment of detainees in any armed conflict is governed by international humanitarian law.<sup>36</sup> The US considers itself at war and if one understands the attacks of September 11<sup>th</sup> as the occasion of that war beginning, anyone arrested (read: taken prisoner) in connection with this war must be treated in accordance with the laws laid down in the Geneva Conventions. The designation of the actions of Al-Qaeda, except where members participate alongside more conventional

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<sup>34</sup> R. Dworkin, *The Threat to Patriotism*, NEW YORK REVIEW OF BOOKS (February 28, 2002).

<sup>35</sup> See R. Dworkin, *Terror & the Attack on Civil Liberties*, NEW YORK REVIEW OF BOOKS (November 6, 2003).

<sup>36</sup> The question of the applicability of the Geneva Conventions in the War on Terror is controversial and has been the subject of vast amounts of print. The conflicts in Afghanistan and Iraq are clearly international armed conflicts and, as all are parties to the Geneva Convention, the conclusion suggested here is that the Geneva Conventions as well as customary international humanitarian law apply in full; as McDonald and Sullivan note, international humanitarian law must be interpreted in light of the principles thereof, such as the Martens Clause of 1899, and that such guiding principles ensure the applicability of the Geneva Conventions even in types of conflict previously unseen, such as a so-called War on Terror. McDonald & Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 HARVARD JOURNAL OF INTERNATIONAL LAW 301 (2003). While the Bush administration clearly disagrees, they have failed to provide a legal reason upon which they base their decision, asserting instead that the Conventions are simply no longer relevant in this not-so-brave new world. See also

[http://www.icrc.org/Web/Eng/siteeng0.nsf/0/C82A7582AE20DCD1C1256D34004AEA41/\\$File/George+Aldrich\\_3\\_final.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/0/C82A7582AE20DCD1C1256D34004AEA41/$File/George+Aldrich_3_final.pdf?OpenElement).

armed forces in, say, Afghanistan or Iraq, as constituting part of an international conflict is obviously a controversial interpretation,<sup>37</sup> but one which can turn to the designation by the Security Council of the events of 9/11 as a threat to international peace and security for support.<sup>38</sup> Moreover, the Appeals Chamber of ICTY in its *Tadic* ruling set a standard for an armed conflict protected by the Geneva Conventions as “protracted armed violence between governmental authorities and organized armed groups”.<sup>39</sup> It can be argued that the regular terror attacks claimed by members of the Al-Qaeda network in the period before and since September 11<sup>th</sup> meets the definition of ‘protracted’. Although contentious, it is thus alleged that Bin Laden has been detained in a situation of international armed conflict.

Since we are dealing with a situation of war, most relevant here are the Third and Fourth Geneva Conventions,<sup>40</sup> dealing with the protection and treatment of captured combatants during an international armed conflict - those entitled to Prisoner of War (POW) status - and with persons involved in an armed conflict who can not aspire to the high level of protection granted POWs, such as civilians, respectively. These two conventions aim at providing a certain status to every person involved in an armed conflict. Article 5 of the Third Convention thus reads as follows: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4,<sup>41</sup> such persons shall enjoy the protection of the present Con-

<sup>37</sup> According to the State Department, Al-Qaeda is “not a state party to the Geneva Convention; it is a foreign terrorist group”. *Status of Detainees at Guantanamo*, US DEPARTMENT OF STATE POLICY DOCUMENT, Feb. 7, 2002, <http://www.state.gov/p/sa/rls/fs7910pf.htm>.

<sup>38</sup> Security Council Res. 1368 at para. 1 (12 Sept. 2001).

<sup>39</sup> *Supra* note 25. Noëlle Quénivet, *The “War on Terror” and International Humanitarian Law*, available at [http://www.ruhr-uni-bochum.de/ifhv/news/Tashkent\\_Speech%20Quenivet.pdf](http://www.ruhr-uni-bochum.de/ifhv/news/Tashkent_Speech%20Quenivet.pdf).

<sup>40</sup> It is assumed, for ease, that it is accepted by all that Additional Protocols I and II have not attained the status of custom and thus do not apply (the US is not a signatory and nor are any of the parties against whom it considers its enemies). The application of the Protocols effects the definition of combatant but will not be considered here.

<sup>41</sup> Third Convention’s Article 4 enumerates: “A. Prisoners of war are .... 1. Members of the armed forces ....; 2. Members of other militias and members of other volunteer corps, ..., provided that ... (they) ... fulfil the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of conducting their operations in accordance with the laws and customs of war. 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. 4. Persons who accompany the armed forces without actually being members thereof, ....; 5. Members of crews (...) who do not benefit by more favourable treatment under any other provisions of international law. 6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. B. The following shall likewise be treated as prisoners of war under the present Convention: ....”.

vention until such time as their status has been determined by a competent tribunal." Thus, all those arrested or taken prison are considered POWs until determined otherwise by a 'competent tribunal', whereupon they are either confirmed as such or fall under the protection of the Fourth Convention regarding civilian persons.<sup>42</sup> According to the Commentary of the authoritative International Committee of the Red Cross, these articles ensure that nobody in enemy hands can fall outside the law. The category of 'unlawful combatant' is not part of the Geneva Conventions' regime.

This, of course, does not mean that those falling under these two Conventions, protecting POWs or civilians, cannot be tried by a court martial or a criminal court. The taking up of arms against the enemy during war does not in itself constitute a criminal offence. The question of *ius in bello* is not connected to the matter of *ius ad bellum* and thus the fact that hostilities were not announced by the organizers or perpetrators of the 9/11 attacks prior to them, does not affect their status once captured. Nonetheless, POW status does not protect a person from being charged with war crimes, crimes against humanity or common crimes; nor are persons granted civilian status under the Fourth Convention free from prosecution for such offenses. According to convention provisions, however, both civilians and POWs must receive a fair and regular trial and each detainee is entitled to "the essential guarantees of independence and impartiality as generally recognized".<sup>43</sup>

The US authorities have not followed this generally accepted interpretation of the Geneva guarantees. From the outset, Secretary of Defense Rumsfeld declared that the detainees were, as he labeled them, 'unlawful combatants' without rights under the Geneva Conventions.<sup>44</sup> Those taken into custody by the US Army were transferred to Guantanamo Bay, a small Cuban strip that is legally speaking not part of US territory.<sup>45</sup> For that reason, those detainees cannot appeal to ordinary American courts, for example, for a writ of habeas corpus, and standards guaranteeing a basic level of detention conditions are not applicable.<sup>46</sup> This decision has been severely criticized, and the US Government has in the meantime moderated its position by

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<sup>42</sup> Or: 'protected persons', see J. Cerone, *Status of Detainees in International Conflict, and their Protection in the Course of Criminal Proceedings*, THE AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS, <http://www.asil.org/insights/insigh81.htm>.

<sup>43</sup> Fourth Convention, Article 3; see also Third Convention, Article 84.

<sup>44</sup> See, e.g., <http://www.armed-services.senate.gov/statemnt/2001/011212wolf&rums.pdf>; See also <http://www.us-mission.ch/press2002/0802detainees.htm>.

<sup>45</sup> At the time of writing, some 650 persons from around 42 countries are being held there.

<sup>46</sup> In order to have the lawfulness of their detention tested by the court.

distinguishing between Taliban Government forces and Al-Qaeda fighters,<sup>47</sup> and by promising to treat them humanely, "in a manner that is reasonably consistent with the principles of the Third Geneva Convention, to the extent that they are appropriate".<sup>48</sup> Only recently, the US Supreme Court has decided to take on four terror-related cases, two of which relate to the indefinite detention of non-US citizens at Guantanamo and the two others relate to the power of the President to designate US citizens as enemy combatants. Hearings are supposed to start shortly, with a decision foreseen for this summer.<sup>49</sup>

While this concession to international criticism mitigates the earlier decision, there are several good reasons why the decision not to apply the standards of the Geneva Conventions is not simply unlawful, but unwise. Firstly, decisions on what status detainees should be granted must be decided by a court on an individual basis, as the US Government did during the First Gulf War, and not by way of classifying a whole group of persons; secondly, deviating from the Geneva system will work as a dangerous precedent and have adverse effects for all combatant parties including the American army;<sup>50</sup> thirdly, circumventing international humanitarian law in order to obtain valuable information from imprisoned 'terrorists' is of no avail, since the duty to abstain from torture and inhuman and degrading treatment does not follow from this alone, but also from other sources of legal guarantees.<sup>51</sup>

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<sup>47</sup> This distinction might not work since some argue that Al-Qaeda was part and parcel of the Taliban Government, Robertson, *supra* note 16, at 478, 480, 496. See also Article 75 Geneva protocol I (ratified neither by the US nor by Afghanistan, but nevertheless regarded as customary law). For a different view, see A. Roberts, *Counter-terrorism, Armed Force and the Laws of War*, [http://www.ssrc.org/sept11/roberts\\_text\\_only.htm](http://www.ssrc.org/sept11/roberts_text_only.htm) (also published in 44 SURVIVAL 2002).

<sup>48</sup> US DEPARTMENT OF STATE POLICY DOCUMENT, *supra* note 37.

<sup>49</sup> T. Mauro, *High Court at Crossroads*, <http://www.law.com/jsp/article.jsp?id=1076428374712>; D. Cole, *Goodbye, Menschenrechte*, [http://www.zeit.de/2004/17/Essay\\_Cole](http://www.zeit.de/2004/17/Essay_Cole).

<sup>50</sup> Indeed, the US Government is quick to demand the application in full of the Geneva Conventions where its personnel are involved in quasi-legal situations. The capture of Army Chief Warrant Officer Michael Durant in the course of a US operation against the Somali warlord Mohamed Farah Aideed – a non-state party to the Conventions – saw the US Government demand that his treatment be consistent with the provisions of the Third Convention. Details taken from McDonald & Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 HARVARD JOURNAL OF INTERNATIONAL LAW 301 (2003), who note further, "If the Geneva Conventions are binding on Somali warlords, non-state parties must be granted the same protection." McDonald & Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 HARVARD JOURNAL OF INTERNATIONAL LAW 310 (2003).

<sup>51</sup> Despite White House legal Counsel Gonzales's leaked memo that modern terrorism 'renders obsolete strict limitation on questioning of enemy prisoners, quoted in: S. Taylor Jr., *We Don't Need to Be Scofflaws to Attack Terror*, THE ATLANTIC ONLINE, (Feb. 5, 2002). See Third Convention, Art. 17. See also Universal Declaration of Human Rights, Art. 5; International Covenant on Civil and Political Rights, Art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The latter

Thus, in conclusion, Bin Laden in US custody finds himself in a country in which the protection of domestic civil liberties for US citizens, but most especially for aliens, has been restricted to a considerable degree. He himself will be denied the protection of the Geneva Conventions. The refusal to apply the normal standards of either peacetime or war is justified by the contention that fighting terrorism is an exceptional situation, very different from both 'ordinary' situations of armed conflict and peace time, and that the rules of the legal game have to be changed accordingly. This battle against terrorism demands new instruments, of which 'military commissions' or 'military tribunals' constitute the third element of this experiment. Bin Laden would very probably have to face justice in the form of such a commission.

### III. Scenario Two: Military Tribunals

Although some have suggested the contrary,<sup>52</sup> the concept of 'unlawful combatants', used for the Guantanamo detainees, cannot be found in the Geneva Conventions, neither explicitly nor, it is argued here, implicitly. The concept has a different origin, one uniquely American, a point that will be elaborated below.

Nothing in the war on terrorism has provoked as much criticism as Bush's 'Military order of November 13, 2001 - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.'<sup>53</sup> Based on "an extraordinary, national emergency," this Presidential order declares that any individual who is not a US citizen and whom the President reasonably believes to belong to Al-Qaeda or to be engaged in acts of terrorism, must be placed under the control of the Secretary of Defense and be tried exclusively by a military commission, established by the Secretary of Defense and without application of "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."<sup>54</sup> The suspects shall be detained "humanely" by the Defense De-

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prohibits in its Art. 2 (2) the use of torture under emergency situations. Moreover, McDonald and Sullivan argue persuasively that Art. 17 of the Third Convention does not prevent interrogation and suggests that the authorities could have interviewed detainees without needing to deprive them of POW guarantees. McDonald & Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 HARVARD JOURNAL OF INTERNATIONAL LAW 310 (2003).

<sup>52</sup> S. Taylor Jr., *We Don't Need to Be Scofflaws to Attack Terror*, THE ATLANTIC ONLINE, (Feb. 5, 2002); J. Lelyveld, *In Guantanamo*, THE NEW YORK REVIEW OF BOOKS, (November 7, 2002); A. ROBERTS, COUNTER-TERRORISM, ARMED FORCE AND THE LAWS OF WAR.

<sup>53</sup> 66 Fed. Reg., Vol. 222, 57833-57836; See also A. Arato, *The Bush Tribunals and the Specter of Dictatorship* 9 CONSTELLATIONS 458-463 (2002).

<sup>54</sup> It could be argued that this order establishes some sort of rival to the International Criminal Court itself, since it seems to aim at anyone connected to terrorism among the more than 20 million non-

partment until their trial before a military commission, a body composed of military officers. This commission admits all evidence "as would have probative value to a reasonable person," but proceeds in a manner which is consistent with the protection of classified information. Conviction will follow upon the concurrence of two-third of the members of the commission, to be followed by a sentence that may include the death penalty. Only the President or the Secretary of Defense can review this conviction. The possibility of remedy "by any court of the United States or any State thereof, any court of any other nation or any international court" is explicitly excluded.

After fierce criticism, the Defense Department promulgated, on 21 March 2002, an order in which the most extreme provisions have been removed: it introduces the presumption of innocence until a suspect is proven guilty beyond reasonable doubt; the possibilities for legal advice are extended; an unanimity vote is required for a death penalty; some kind of appellate review is introduced although still not by any domestic or international court; under certain circumstances, any such trial would be open to journalists and the public.<sup>55</sup> These revisions constitute real improvement and a step in the direction of a fair trial, but reason for suspicion remains.<sup>56</sup>

Dworkin, for example, has argued that the public status of the trials is still dubious, since it might easily be held behind closed doors (even barring the accused himself) if classified and classifiable information is presented to the court and any possibility of appeal to civilian courts is still lacking. Even under these new procedural rules, an accused might be tried in secret and sentenced to death "on evidence that neither he nor any other outside the military has even heard."<sup>57</sup> In addition, the Pentagon's chief lawyer has stated that the government might not even release accused terrorists who were acquitted by such a tribunal "if they were thought to be dangerous."<sup>58</sup> This renders the effectiveness of these tribunals fully dependent on the executive, and their existence seems to violate one of the corner stones of the rule of law, the separation of the executive and the judiciary. These tribunals do not arguably constitute a court at all but are merely an extension of the powers of the President, who acts either personally or through the officers he commands as

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citizens in the US and all others in the rest of the world, *see* American Civil Liberties Union (ACLU) Memorandum on Military Tribunals 4 (November 29, 2001).

<sup>55</sup> *Military Commission Order No. 1*, DEPARTMENT OF DEFENSE, March 21, 2002.

<sup>56</sup> *See* <http://news.bbc.co.uk/1/hi/world/americas/3334823.stm>

<sup>57</sup> R. Dworkin, *The Trouble with the Tribunals*, THE NEW YORK REVIEW OF BOOKS (April 25, 2002).

<sup>58</sup> *Id.*; *See also* J. Lelyveld, *In Guantanamo*, THE NEW YORK REVIEW OF BOOKS, (November 7, 2002).



prosecutor, judge, jury, and appeal judge.

It is essential to distinguish these tribunals or commissions from the institution of military courts or court-martials, which are common in many legal systems.<sup>59</sup> There are good reasons for having this sort of military justice. Sometimes, for example in times of war, there is a need for rapid adjudication near the battlefield, based on specialized knowledge. Even when war is not imminent, the differences between the military world and the civilian may justify the existence of specialized courts, which take seriously the demands of strict authority relationships, discipline, restricted privacy and the use of lethal weaponry. Importantly, the fact that these courts exist, does not necessarily affect the quality of the trial itself. Generally, it is held that the US military justice system respects basic principles of fairness.<sup>60</sup> And if it adjudicates its own soldiers in a fair way, nothing stands in the way of adjudicating by way of the same procedures foreign soldiers who are accused of committing crimes.<sup>61</sup>

The military commissions have their roots in American history. Military commissions are connected with the distinction between legal and illegal combatant. While legal combatants can indeed be tried before an ordinary court or a court-martial, illegal combatants may not be. These commissions have been used repeatedly by the U.S. in times of war. They were used during the American Revolution by George Washington, during the Mexican-American War in the mid 19<sup>th</sup> century and especially during the Civil War, where there may have been as many as 4000 military commissions. This institution created the possibility of trying and convicting people who would otherwise have been released by civil courts, not because of their innocence but because of the sympathies of the jurors.<sup>62</sup>

During the Civil War period, the use of these commissions was contested. In *'Ex Parte Milligan'*,<sup>63</sup> Lamdin Milligan was convicted by a commission for serious of-

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<sup>59</sup> C.L. Eisgruber & L.G. Sager, *Military Courts and Constitutional Justice*, <http://www.utexas.edu/laws/news/colloquium/papers/Sager-Eisgruber.doc>; See also Robertson, *supra* note 16, at 502, 508.

<sup>60</sup> C.L. Eisgruber & L.G. Sager, *Military Courts and Constitutional Justice*, <http://www.utexas.edu/laws/news/colloquium/papers/Sager-Eisgruber.doc> (referring to the Supreme Court's *Weiss v. United States*, 510 U.S. 163 (1994)); A. Neier, *The Military Tribunals on Trial*, THE NEW YORK REVIEW OF BOOKS (February 14, 2002).

<sup>61</sup> Third Geneva Convention, art. 102. Of course, fighting a war itself is not a criminal offense, as the important difference between a soldier and a criminal is acknowledged.

<sup>62</sup> J. Dean, *Military Tribunals*, at <http://writ.news.findlaw.com/dean/20011207.html>, and J. Wallace, *Military Tribunals*, <http://www.spectacle.org>.

<sup>63</sup> 71 US (4 Wall.) 2 (1866).

fenses, including violation of the laws of war, while aiding the Confederacy. His conviction was overturned by a unanimous Supreme Court, which argued that he, as a citizen of a non-seditious state, could not be tried by a military tribunal and that regular courts were available to hear his case, in full respect of the Fifth and Sixth Amendment. The Supreme Court said: "[U]ntil recently no one ever doubted that the right to trial by jury was fortified in the organic law against the power of attack. It is now assailed. [T]his right – the most valuable in a free country – is preserved to every one accused of crime who is not attached to the army, navy, or militia in actual service." Thus, the jurisdiction of the military could not be extended beyond those who were actually serving in the military, to the civilian world outside.<sup>64</sup> The Supreme Court also argued, although without unanimity, that only Congress, and not the President, could authorize detention without trial.<sup>65</sup>

In order to justify the recent order, however, the government relies upon a later Supreme Court decision in which the use of military commissions was upheld. This is the now well-known '*Ex Parte Quirin*' case.<sup>66</sup> In 1942, eight Nazi saboteurs, one of them named Richard Quirin, landed on American shores in order to commit acts of sabotage. Mainly through deliberate negligence and by supplying the FBI with information, the saboteurs, none of them committed Nazis, were arrested without having caused any damage. President Roosevelt, however, demanded that these men be tried before a military commission and refused them access to a civilian court.<sup>67</sup> The aim was that their trial be held quickly and in secret. Furthermore, the prestige of the FBI would be protected and the American public assured that their coastlines were well protected. The saboteurs were accordingly convicted by a military commission and sentenced to death. The men's lawyers contended before the Supreme Court that the military commission violated the US Constitution and the

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<sup>64</sup> Statement of T. Lynch, Cato Institute, before the Senate Judiciary Committee, at <http://www.cato.org>. It seems as if 'Milligan' allows only two kinds of justices: civil justice for civilians and military justice for those serving in the armed forces. Some argue that the critical stance of the Supreme Court in *Milligan* could have been prevented by better legal counsel on the part of the government, see Dean, *Military Tribunals*, *supra* note 62; R.G. MCCLOSKEY, *THE AMERICAN SUPREME COURT*, 71-3 (3rd ed. 2000).

<sup>65</sup> This point was not unimportant as it is related to the fact that there was no official declaration of war or act of Congress on which the President could rely. U.S. CONST., art. I, § 8, cl. 11.

<sup>66</sup> *Ex Parte Quirin*, 317 US 1 (1942). For extensive details of the case, G. Cohen, *The Keystone Kommando's*, *THE ATLANTIC MONTHLY* (February 2002); Furthermore, the government relies upon '*Johnson v. Eisentrager*', a 1950 decision in which a *habeas corpus* petition filed by German nationals seized in China and held in a U.S. prison in Germany was denied by a court, the justices refusing to exert jurisdiction. See T. Mauro, *High Court at Crossroads*, at <http://www.law.com/jsp/article.jsp?id=1076428374712>

<sup>67</sup> President Franklin Delano Roosevelt, *Proclamation of July 2, 1942: Denying Certain Enemies Access to the Courts of the United States*, FED. REGISTRAR 1942, 5, 103 (1942), quoted in Roberts, *Counter-terrorism, Armed Force and the Laws of War*, *supra* note 47.

precedent set by the *Milligan* decision, and requested a new trial. The Supreme Court, however, upheld the legitimacy of the military commission, arguing that the situation in the *Milligan* case was entirely different from that of *Quirin*. The Court held that "by universal agreement and practice the law of war draws a distinction between (...) those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."<sup>68</sup> Today, it is '*Ex Parte Quirin*' that is cited as precedent.<sup>69</sup> However, this decision is widely regarded as unsuitable to serve as such an important precedent. It is overtly reverential to the government<sup>70</sup> and the then- Supreme Court, operating in the tense period of World War II, did not have a good record on civil liberties.<sup>71</sup>

The most likely fate for Bin Laden, were he to fall into American hands and not suffer summary execution, would be trial before such a military commission, followed by the imposition of the death penalty. Following the closure of our thought experiment, the consequences of trying Bin Laden before a military commission, both in terms of practical advantage and of justice, will be considered. The Bush administration holds indeed that a category of 'illegal combatants' must be distinguished from the categories of ordinary POWs and ordinary criminals. Like the German saboteurs, terrorists are illegal combatants who sneak behind enemy lines, conceal their military affiliation, and have no regard for the laws of war. Since terrorists thus violate the laws of war, they are to be tried before a special commission. Such a principled stance, it is argued, also has a number of practical advantages: in a trial by military commissioners, there is no risk of a jury being intimidated by terrorists; confidential and classified material, essential for the war on terrorism,

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<sup>68</sup> Quoted in Wallace, *Military Tribunals*, *supra* note 62. The Hague Convention would then protect only the former, but not the latter.

<sup>69</sup> See, for example, Neier, *The Military Tribunals on Trial*, *supra* note 60.

<sup>70</sup> See, for example, Dworkin, *The Threat to Patriotism*, *supra* note 31.

<sup>71</sup> Only two years later, the Supreme Court upheld the internment of Japanese Americans, in: *Korematsu v. United States*, 323 U.S. 214 (1944). In the *Yamashita* case, 327 U.S. 1 (1946), the Supreme Court upheld the legitimacy of the military commission trying the Japanese Commander of the Philippines, Yamashita. In this case too, the court held that procedural protections were not available to enemy combatants. Two justices dissented here. Justice Murphy argued that the due process right mentioned in Fifth Amendment applies to all persons and that this was not respected in this case. Justice Rutledge argued that hearsay evidence of all type was admitted here which would have been excluded in a US court, and he complained that the universal protection of fair trial was violated. See Wallace, *Military Tribunals*, *supra* note 60. Moreover, the Supreme Court was unnecessarily hasty in its *Quirin* decision, giving judgment only one hour after oral arguments had closed.

need not be disclosed to the general audience, but is only made available for the vetted commissioners; the risk of lengthy, time consuming procedures is minimal and the trial will not provide a platform for terrorist propaganda; in sum, one should accept flexibility with regard to the characterization of a fair trial.

Many commentators do not find this principled stance or the practical advantages asserted very convincing. They argue that there seems to be no practical necessity to resort to military commissions. In the past, ordinary civil courts have successfully tried terrorism cases, such as that of Timothy McVeigh, or that of the 1993 attacks on the World Trade Center. Legislation exists to successfully accommodate both the government's wish for secrecy and the requirement that the accused be able to confront the evidence against him. Likewise, legislation has served to protect the identity and security of jurors in criminal cases against organized crime.<sup>72</sup> An ordinary trial might indeed be more time consuming, but this is what procedural justice requires. Moreover, it is not evident that a long trial will serve propaganda purposes: does the Serbian nationalist cause benefit from Milosevic being able to tell his 'truth' in The Hague?<sup>73</sup> What would be the most effective way to neutralize Bin Laden? To have him tried, convicted and executed after a secret trial which would assure him of hero status in the eyes of many, or to subject him to a demystifying trial which would reveal not only the morally appalling consequences of his deeds, but also his and his organization's hypocrisies and cruelties? An ordinary criminal trial against Bin Laden would not focus on a so-called clash of civilizations, but simply on the 'mens rea' for the commission of a crime against humanity. It would reduce Bin Laden "to human stature."<sup>74</sup>

To the implausibility of the so-called practical advantages of military commissions many practical disadvantages can be added. Convictions reached by these commissions might easily lack sufficient credibility, especially outside the US.<sup>75</sup> This institution devaluates the earlier US critique of similar courts in other countries and makes any future critique look hypocritical.<sup>76</sup> The use of these commissions will undermine the willingness of other countries to extradite suspects<sup>77</sup> and aggravate

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<sup>72</sup> AMERICAN CIVIL LIBERTIES UNION (ACLU), *Memorandum on Military Tribunals*, under III.

<sup>73</sup> Cf. T. Judah, *The Star of The Hague*, THE N.Y. REVIEW OF BOOKS, 25 April 2002.

<sup>74</sup> Robertson, *Crimes against Humanity*, *supra* note 16, at 509; One might also reconsider Hannah Arendt's thesis on the banality of evil, in: Arendt, *Eichmann in Jerusalem*, *supra* n. 20.

<sup>75</sup> Neier, *The Military Tribunals on Trial*, *supra* note 60.

<sup>76</sup> HUMAN RIGHTS WATCH, *Fact Sheet: Past US Criticism of Military Tribunals*, at <http://www.hrw.org/press/2001/11/tribunals1128.htm>; AMERICAN CIVIL LIBERTIES UNION (ACLU), *Memorandum on Military Tribunals*, under V; Neier, *The Military Tribunals on Trial*, *id.*

the tension that already exists between the US and other countries because of the Order's neglect of international standards for due process, as embedded in Articles 14 and 4 of the International Covenant on Civil and Political Rights, and due to divergent views on the death penalty.

Whether sufficient legitimation for military commissions exists does not depend entirely on the lists of practical pros and cons. The argument in principle is decisive, and that centers on the question of whether it is legitimate to distinguish between legal and illegal combatants. If acts of illegal combatants such as terrorists differ in essence from ordinary criminal acts and from ordinary war crimes, then this distinction is valid and prosecuting them before a military commission with restricted procedures is justified. But the main flaw in this reasoning is the question of *quis judicabit*. One cannot prosecute suspects before such a military commission unless there is convincing evidence that they indeed committed the atrocious acts that would characterize them as illegal combatants. The decision to try them before a military commission effectively declares them to be illegal combatants. Yet it should precisely be the commission's task to establish whether or not they are "illegal combatants," guilty of "unlawful belligerency" or not. The use of military commissions violates the presumption of innocence. This flaw was apparent in *Ex Parte Quirin*: the reason why the saboteurs were refused a trial by jury was that they were accused of being "illegal combatants". Despite their denial – at least two of them claimed that they were present on these missions solely to escape from Germany – they were nonetheless turned over to a military tribunal and convicted. Although their determination as illegal combatants did not necessarily entail conviction, it reduced their opportunity to prove their innocence because of the procedural restrictions applied. The institution of military commissions does not respect the principle that criminal procedural rules should be designed in such a manner that the risk of convicting someone who is innocent be as low as possible.<sup>78</sup>

While the proponents of military commissions might admit such flaws, they would stress that the sort of terrorism seen on 9/11 is something completely new. As it has changed the world, it must change our standards of fairness. In ordinary criminal procedures and in ordinary court-martials, it is rightly assumed that it is better to set a hundred guilty persons free than to convict one single innocent person, and to accept the risk involved in this balance.<sup>79</sup> With regard to terrorism, it is alleged that

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<sup>77</sup> Neier, *The Military Tribunals on Trial*, id.

<sup>78</sup> 'As low as possible', since a criminal trial exemplifies only imperfect procedural justice: it seems impossible to design the legal rules in such a way that they always lead to the correct result, namely that a defendant is declared guilty if, and only if, he is guilty, in line with: J. RAWLS, *A THEORY OF JUSTICE*, 85 (Oxford 1971).

<sup>79</sup> In the past, however, many death row cases testified to the opposite.

we simply cannot afford to take such risks. It is no longer, the proponents argue, an acceptable policy to let the guilty go free for fear of punishing the innocent. A different balance must be found between the security needs of society and the protection of the rights of the accused.<sup>80</sup> In this new era, it is, regrettably, better to convict an innocent person than to let a terrorist go free.<sup>81</sup> Such an argument plays on understandable fears and thus seems stronger than it really is. If the argument is turned around and one asks whether it would be acceptable to convict and sacrifice a hundred innocent people in order to “neutralize” one terrorist, the answer is less evident. However, if national security indeed requires the curtailment of the rights of the accused, an argument not necessarily accepted, the government should aim at curtailing them as little as possible, and should publicly acknowledge that by doing so it acts unfairly.<sup>82</sup>

#### E. Conclusion

This piece is a thought experiment indeed. However, the likely outcome of Bin Laden in US control is clear. Yet the reason as to why the authorities would pursue a course so widely condemned, even by staunch allies<sup>83</sup> and US citizens,<sup>84</sup> and which would not necessarily bring the practical advantages claimed, remains to be examined. It would be too easy to presume on the part of the US Government an unwillingness to listen to good arguments and to attribute to the latter bad faith with regard to due process and fair trial.

The preference in the US for military commission justice arguably stems from two interconnected reasons. Firstly, there exists a basic difference in the way in which the US and Europe have traditionally regarded international law.<sup>85</sup> This is clearly

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<sup>80</sup> L.H. Tribe, *Trial by Fur*, THE NEW REPUBLIC, 10 Dec. 2001, quoted in Dworkin, *The Threat to Patriotism*, *supra* note 31.

<sup>81</sup> J. Wallison, *In favor of military tribunal*, CHRISTIAN SCIENCE MONITOR, (3 Jan. 2003) available at <http://www.csmonitor.com>

<sup>82</sup> Dworkin, *The Threat to Patriotism*, *supra* note 31; C.L. Eisgruber and L.G. Sager, *Military Courts and Constitutional Justice*, *supra* note 59.

<sup>83</sup> The detention of British citizens in Guantanamo Bay placed real pressure on the so-called ‘special relationship’, although much of it behind closed doors. K. Ahmed and T. McVeigh, *Terror camp Britons to be sent home*, THE OBSERVER, 30 Nov. 2003. available at <http://observer.guardian.co.uk/international/story/0,6903,1096508,00.html>

<sup>84</sup> Among others: S. Hoffmann, *On the War*, THE N.Y. REVIEW OF BOOKS, 1 Nov. 2001; T. Judt, *America and the War*, THE N.Y. REVIEW OF BOOKS, 15 Nov. 2001.

<sup>85</sup> Compare, the American attitude towards the Kyoto protocols and the Johannesburg summit. The US has not ratified many widely supported conventions, such as the conventions regarding land mines, prohibiting discrimination against women, protecting the rights of the child and the Additional Proto-

formulated by Habermas in his assessment of US policy both in Kosovo and, recently, in the second Iraq War in identifying the dual elements of pursuing national interests and of promoting human rights at the base of US policy. With regard to actions in Kosovo, Habermas wrote that the US “conceives the international enforcement of human rights as a national mission of a world power which pursues this goal according to the premises of power politics. Most of the EU Governments see the politics of human rights as a project committed to the legalization of international relations”.<sup>86</sup> While the EU stresses the need to embed human rights in international law, the US is rather distrustful of international law and remains committed to its own standards. In connection with the recent Iraq War, Habermas took a stronger stance and initiated the engagement of leading European intellectuals to formulate a European answer to what he understood as American unilateralism.<sup>87</sup>

Secondly, this division has been intensified by the way in which the attacks were and are perceived on either side of the Atlantic, and by differing views as to the best means to address this new threat. While Europeans do not deny the magnitude of the events of September 11<sup>th</sup>, they are not (yet) fully convinced of a fundamental transformation in the nature of international relations. For the US it seems, the entire nature of the world they inhabit has changed; Condoleezza Rice spoke of a shifting of the tectonic plates of international politics.<sup>88</sup> Much of course has been written and said on the different approach of the Europeans and the Americans to international relations since 2001 and it does not need repeating here; there is however a clear connection between the different understandings of the attacks and the different approaches to criminal justice for those caught up in these new hostilities. In his now well-read article “Power and Weakness”, one of the Bush administration’s house intellectuals Robert Kagan contrasted the Promethean tasks faced by the US in the real world of international anarchy with the European view of an ideal world regulated by binding international law.<sup>89</sup> The disagreement, according to Kagan, boils down to an opposition between Kant and Hobbes. Kagan writes: “It is time to stop pretending that the Europeans and Americans share a common view

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cols to the Geneva Conventions. Robertson, *Crimes against Humanity*, *supra* note 16, at 87; J.E. Alvarez, *Do Liberal States Behave Better? - A Critique of Slaughter’s Liberal Theory*, 12 EUR. J. OF INT’L L. 183, 183-246 (2002).

<sup>86</sup> J. Habermas, *Bestiality and Humanity*, 6 CONSTELLATIONS 269 (1999).

<sup>87</sup> J. Habermas & J. Derrida, *Unsere Erneuerung. Nach dem Krieg: Die Wiedergeburt Europas*, FRANKFURTER ALLGEMEINE ZEITUNG, 31 May 2003.

<sup>88</sup> F. FitzGerald, *George Bush & the World*, THE N.Y. REVIEW OF BOOKS, 26 Sept. 2002.

<sup>89</sup> See also T. Judt, *Its Own Worst Enemy*, THE N.Y. REVIEW OF BOOKS, 15 Aug. 2002. See also Symposium the GLJ Kagan symposium, September 2003, at [http://www.germanlawjournal.com/past\\_issues\\_archive.php?show=9&volume=4](http://www.germanlawjournal.com/past_issues_archive.php?show=9&volume=4)

of the world, or even that they occupy the same world; Europe is entering a post-historical paradise of peace and relative prosperity, the realization of Kant's Perpetual Peace. The United States, meanwhile, remains mired in history, exercising power in the anarchic Hobbesian world where international law and rules are unreliable and where true security and the defense and the promotion of a liberal order still depend on the possession and the use of military might."<sup>90</sup> This would indeed, if a fair characterization, explain much of the different attitudes revealed in the thought experiment.<sup>91</sup>

Hobbes' political vision is not the comforting story of a government dedicated to protecting a wide range of natural rights or to promoting 'life, liberty and the pursuit of happiness', but the discomfiting story of a government whose legitimacy is derived solely from its capacity to guarantee its citizens' safety and self-preservation.<sup>92</sup> In order to make this plausible, as we all know, Hobbes sketches a miserable picture of the state of nature, in which the life of man is solitary, poor, nasty, brutish and short. The foundation of the "leviathan"<sup>93</sup> brings an end to this miserable situation, but it does so only temporarily. The world remains a dangerous place and the leviathan's safety is permanently threatened from the inside by disobedient acts. However the "leviathan" is especially at risk from the outside, by acts that aim at destroying the bonds of the leviathan itself. There is, so to speak, always the possibility of an 'emergency situation.' The concept of "illegal combatants" would seem to fit well into Hobbes' vocabulary: these warriors aim at destroying civil society; they live in the state of nature, where civil laws, both domestic and international, do not apply. If they are captured, leviathan does not need to grant them any rights: it may treat them humanely, but it is under no obligation to do so.

Kant never accepted so "realistic" an interpretation of concepts such as the "state of nature" or the "social contract." The latter does not give us a historical explanation

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<sup>90</sup> R. Kagan, *Power and Weakness*, 113 Policy Review 1 (2002); fortunately for the Europeans, Kagan adds that 'the US is a Behemoth with a conscience, a liberal, progressive society through and through.' The article was followed by a book *Of Paradise and Power* (New York, 2003), which added little to the main thrust of the argument. For an interesting comment on Kagan see D. Runciman, *A Bear Armed with a Gun*, LONDON REVIEW OF BOOKS, 3 Apr. 2003.

<sup>91</sup> In his recent *America's Crisis of Legitimacy* (83 Foreign Affairs 87 (2002)), Kagan mildly modified his position, arguing that "... Americans will need the legitimacy that Europe can provide..."

<sup>92</sup> See, for example, L. Strauss, *Natural Right and History*, 181 (Chicago 1950).

<sup>93</sup> Th. Hobbes, *Leviathan*, Ch XVII: 'The great LEVIATHAN, or rather, to speak more reverently, (...) that mortal god to which we owe, under the immortal god, our peace and defence'.



of the state, but informs us of how the state ought to be, according to Kant.<sup>94</sup> He did not fear so much the return of the state of nature after the establishment of the leviathan, but the continuation of the state of nature between a plurality of “leviathans” or between “leviathans and ‘outlaws,’” illegal combatants or terrorists in other words. This state of nature can only be brought to an end when these sovereigns form a League of Nations in which their conflicts can be resolved peacefully; the failure to form such an association will see them and their leaders place themselves above the law. The leviathan is thus not threatened by the return of the illegal combatant, but by the absence of international law, which makes these “leviathans” themselves illegal combatants. International law, including international criminal law, must prevent that by considering all “individuals and states as citizens of a universal state of mankind.”<sup>95</sup>

Although military commissions and the ICC are juxtaposed by the differing visions of world order underpinning those that promote them, there is yet a commonality between the two individuals who have provoked this discussion. When concluding his September 20<sup>th</sup> State of the Union, President Bush expressed his confidence that God would watch over the United States of America. From the taped statements he has released, Bin Laden is apparently also fully convinced, using similar rhetoric, that Allah is on his side. Both invoke their ultimate “Sovereigns.” Here lies the real danger, namely that in changing our societies according to the perceived needs of security, we face turning Kantian open societies into Hobbesian fortresses, and nothing will then in the end distinguish democracy from fundamentalist societies.<sup>96</sup> The fundamentalist Bin Laden may lose the legal battle, but he will win the political war if his opponents mirror fundamentalist values by accepting the view that this war is a clash between two equally justified leviathans.

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<sup>94</sup> I. Kant, *Reflexionen zur Rechtsphilosophie*, 19 AKADEMIE AUSGABE 504 (No. 7740, see also 7737).

<sup>95</sup> I. Kant, *Perpetual Peace - A Philosophical Sketch*, 98-99.

<sup>96</sup> For a similar line of thinking, see R. Rorty, *Post-Democracy*, LONDON REVIEW OF BOOKS, 1 Apr. 2004.